

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In The Matter of)	
)	
Performance Measurements and Standards for Interstate Special Access Services)	CC Docket No. 01-321
)	
Petition of US West, Inc. for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision Of Federally Tariffed Interstate Services)	CC Docket No. 00-51
)	
Petition of Association of Local Telecommunications Services for Declaratory Ruling)	CC Docket Nos. 98-147 96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards of Of Section 271 and 272 of The Communications Act of 1934, As Amended)	CC Docket No. 96-149
)	
2000 Biennial Regulatory Review-Telecommunications Service Quality Reporting Requirements)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self- Executing Remedies Needed to Ensure Compliance By ILECs with Their Statutory Obligations Regarding Special Access Services)	RM 10329
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**REPLY COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby responds to the comments of BellSouth Corporation ("BellSouth"), Qwest Communications International, Inc. ("Qwest"), SBC Communications Inc. ("SBC"), and the Verizon Telephone Companies ("Verizon") (collectively, the "Large Incumbent LECs") submitted in response to the

Notice of Proposed Rulemaking, FCC 01-339, released November 19, 2001, in the captioned proceedings (“*NPRM*”). In the *NPRM*, the Commission sought comment on whether it “should adopt a select group of performance measurements and standards for evaluating incumbent local exchange carrier (“incumbent LEC”) performance in the provisioning of special access services.”¹

The Large Incumbent LECs urge the Commission to refrain from taking such action, arguing that the special access market is highly competitive, that market forces ensure that incumbent LECs provide special access services in a manner acceptable to their customers, and hence that national measurements and standards for incumbent LEC provision of special access service are unnecessary.

The Large Incumbent LECs also challenge the authority of the Commission to adopt, implement and enforce special access performance measurements and standards.

As ASCENT demonstrated in its Comments, the continuing deterioration of incumbent LEC provisioning of special access services, coupled with the ever increasing incentives for incumbent LECs to discriminate against competitors in this critical service area, create a compelling need for Commission adoption of national performance measurements and standards.

And as ASCENT further demonstrated in its Comments, the Commission has ample authority to adopt, implement and enforce special access performance measurements and standards.

1. Adoption of Special Access Performance Measurements and Standards is both Necessary and Appropriate

¹ NPRM at ¶ 1.

Incumbent LEC claims that market forces render adoption of special access performance measurements and standards unnecessary and that special access services are being provisioned in a timely, high quality, and nondiscriminatory manner can be dispensed with readily.²

The Large Incumbent LECs have made the same claims on a number of previous occasions, contending variously that the market for special access services is highly competitive, that competitors have widely deployed high-capacity facilities, and that a viable wholesale market for such facilities exists.³ The Commission, however, has never found these contentions to be credible.

Thus, for example, the Commission has characterized the “wholesale market . . . in loop fiber” as “nascent,” concluding that the wholesale market in fiber loop facilities is “not extensive enough” to provide a ubiquitous alternative to incumbent LEC facilities.⁴ As described by the Commission, “[a]lthough the record indicates that competitive LECs have deployed transport facilities along certain point to point routes, the record also demonstrates that self-provisioned transport, or transport from non-incumbent LEC sources, is not sufficiently available as a practical, economic and operational matter.”⁵ Or looked at from a different angle, the mere fact that “some competitive LECs, in certain instances, . . . serve certain customers using their own loops” does not render non-incumbent LEC-provided high capacity facilities a viable, ubiquitously-available alternative.⁶ And,

² BellSouth Comments at 18 - 19; SBC Comments at 8 - 10; Qwest Comments at 6 - 8; Verizon Comments at 4 - 7.

³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶¶ 181 - 200, 318 - 68 (1999) (*subsequent history omitted*); Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, 14 FCC Rcd. 19947 (1999) (*subsequent history omitted*)

⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 197.

⁵ Id. at ¶ 321.

with respect to the competitive posture of the special access market, the Commission has found that evidence heretofore provided by the Large Incumbent LECs “is not sufficient to support a conclusion that they are no longer dominant in the provision of special access and high capacity dedicated transport services or that sufficient competition exists to preclude anti-competitive conduct in those markets.”⁷

As ASCENT emphasized in its Comments, these conclusions have recently been reaffirmed by the New York Public Service Commission (“NYPSC”) which concluded that in the State of New York, Verizon “continues to occupy the dominant position in the Special Services market and by its dominance is a controlling factor in the market.”⁸ Illustrating its assessment, the NYPSC noted that competitors had brought fiber to a tiny fraction of the over 220,000 “mixed use, commercial, or public institutions” in New York City, “virtually all” of which were served by Verizon, and that outside of New York City, competitors are even more reliant on Verizon facilities.⁹ Thus, Verizon, by the NYPSC’s reckoning, remains the “dominant provider” of high-speed facilities in what is generally acknowledged to be the most competitive local exchange/exchange access market in the Nation.¹⁰

⁶ Id. at ¶ 184.

⁷ Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, 14 FCC Rcd. 19947 at ¶ 33.

⁸ Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1, p. 9 (NYPSC June 15, 2001).

⁹ Id. at pp. 7 - 8.

¹⁰ Id. pp. 6 - 10.

And the comments submitted by interexchange carriers (“IXCs”), competitive local exchange carriers (“competitive LECs”), and commercial mobile radio service (“CMRS”) providers in this proceeding certainly confirm the assessment of the regulators. For example, Cable & Wireless USA, Inc. (“Cable & Wireless”) advises that “[d]espite . . . [its] preference for using competitive access providers whenever possible, non-ILEC vendors account[] for only a small percentage of Cable & Wireless’ total installations in 2001,” adding that “the competitive access providers it uses presently serve . . . less than two percent of existing office buildings.”¹¹ Sprint Corporation (“Sprint”) and WorldCom, Inc. (“WorldCom”) echo this view, the former advising that it “continues to rely upon the ILECs for approximately 93% of its total special access needs despite aggressive attempts to self-supply and to switch to facilities offered by alternative access vendors (AAVs) whenever feasible,”¹² and the latter noting that “[i]n the past year, approximately 90 percent of . . . [its] off-net special access circuit needs were provisioned by the incumbent LECs, even though it is . . . [its] policy to use the local facilities of WorldCom or other competitive carriers whenever such facilities are available.”¹³

¹¹ Cable & Wireless Comments at 4.

¹² Sprint Comments at 5.

¹³ WorldCom Comments at 9 - 10.

Competitive LECs and CMRS providers further confirm the continued dominance of incumbent LECs in the special access market. VoiceStream Wireless Corporation (“VoiceStream”), for example, declares that “CMRS carrier remain heavily dependent on the special access facilities provided by ILECs,”¹⁴ and AT&T Wireless Services, Inc. (“AT&T Wireless”) adds that it is “heavily reliant on incumbent LEC special access services.”¹⁵ And Focal Communications Corporation (“Focal”) reports that despite its practice of “always us[ing] third-party facilities wherever possible,” it “usually has no alternative but to purchase facilities from incumbents.”¹⁶

The Large Incumbent LECs’ vigorous protestations to the contrary notwithstanding, incumbent LECs thus continue to be the principal, and often the only, source of special access facilities available to IXCs, competitive LECs and CMRS providers alike. But, the Incumbent LECs opine, special access performance measurements and standards should not be adopted because (i) the Commission has heretofore not mandated such reporting,¹⁷ (ii) special access services are provisioned by incumbent LECs on a timely, high quality and non-discriminatory basis,¹⁸ and (iii) performance measurements and standards would interfere with the workings of the special access markets.¹⁹ As to the second point, the records demonstrates otherwise, and it is the deteriorating

¹⁴ VoiceStream Comments at 3.

¹⁵ AT&T Wireless Comments at 3.

¹⁶ Focal, *et al*, Comments at 11 - 12. Tellingly, even end users are cognizant of the competitive deficiencies in the special access market. Comments of the Ad Hoc Telecommunications Users Committee at 3 - 6.

¹⁷ BellSouth Comments at 8 - 9, 12 - 13.

¹⁸ BellSouth Comments at 10 - 11, 15; SBC Comments at 10 - 14; Verizon Comments at 7 - 11.

¹⁹ BellSouth Comments at 11, 13 - 15; SBC Comments at 14 - 16.

level of special access provisioning that requires Commission action now when none was required before. And, as to the third point, the performance measurements and standards that would be adopted here are thresholds only, leaving ample room for service quality competition above such levels.

The deterioration of special access provisioning among incumbent LECs is well documented in the record.²⁰ WorldCom, by way of illustration, details the myriad problems it has confronted in securing special access services from incumbent LECs, characterizing “the incumbents’ performance problems as pervasive, ranging from their inability (or refusal) to issue [Firm Order Commitments (“FOCs”)] in a timely manner to their propensity for missing installation dates they establish in the FOCs,” and faulting as well incumbent LEC maintenance and repair performance.²¹ Noting that it “has experienced a decline in ILEC special access performance in recent years,” Cable & Wireless demonstrates that “presently-available ILEC special access performance data reported by the ILECs and collected by the FCC” evidences a dramatic deterioration in the timeliness of special access provisioning and repairs.²² Among Wireless Carrier, VoiceStream reports that Verizon’s record of provisioning special access services, when measured as a percentage of circuit installations completed by the Firm Order Commitment (“FOC”) date, continues to deteriorate,” and AT&T Wireless reports that it has been experiencing delays, poor quality and discriminatory treatment” in obtaining incumbent LEC special access services.²³ And competitive LECs voice comparable complaints, with US LEC documenting “persistent and repeated

²⁰ It is indeed remarkable, and disturbing, that, in the face of constant and increasing complaints from their admittedly “highly sophisticated customers,” incumbent LECs such as Verizon can claim that “special access competition drives all competitors to provide high-quality service, making performance measures unnecessary.” Verizon Comments at 7 - 8.

²¹ WorldCom Comments at 12 - 18.

²² Cable & Wireless Comments at 5 - 8.

²³ VoiceStream Comments at 6 - 11.

outages in special access services received from BellSouth” and Focal reporting “substandard performance by Verizon in provisioning interstate special access circuits in New York.”²⁴

It is because service has been deteriorating as incumbent LEC incentives increase not only to discriminate against competitors, but to utilize personnel and other resources heretofore dedicate to provisioning special access services elsewhere, that Commission action is required now. As Bell Operating Companies (“BOC”) secure authority to originate traffic in more and more in-region states, new incentives to discriminate against IXC’s combine with existing incentives to discriminate against competitive LEC’s to undermine special access service provisioning. And in order to secure in-region, interLATA authority, BOC’s have been cannibalizing, and continue to cannibalize, special access provisioning resources to enhance local wholesale capabilities. In short, BellSouth’s suggestion that because the Commission has heretofore refrained from imposing special access performance measurements and standards, it should not do so now entirely misses the underlying rationale for the *NPRM*.

²⁴ Focal, *et al*, Comments at 10 - 11. Indeed, as ASCENT pointed out in its Comments, the NYPSC characterized “Verizon’s provision of Special Services . . . [as] below the threshold of acceptable quality.” Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1 at p. 5.

Also missing the point is the contention of the Large Incumbent LECs that special access performance measurements and standards will interfere with the workings of the marketplace. According to the Large Incumbent LECs, the quality of special access services varies along the price/performance continuum. Missing from this contention is cognizance of the statutory non-discrimination mandate, which requires incumbent LECs to offer service of comparable quality to all users, including competitors.²⁵ But more critically, the special access performance measurements and standards advocated by ASCENT and others constitute, as noted above, threshold quality levels above which carriers may offer on a nondiscriminatory basis superior service levels. SBC's contention that "[i]mposition of special access performance standards would . . . forc[e] carriers to focus on meeting government requirements, . . . thus diverting their attention and resources away from meeting the needs of their customers" rings hollow in the face of customer complaints that basic service quality thresholds are not being achieved.²⁶

²⁵ Verizon, of course, declares that its "processes" assure nondiscriminatory provisioning of the very special access services the NYPSC concluded that the carrier was providing in a discriminatory manner. Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1 at p. 6.

²⁶ SBC Comments at 4.

Finally, the Large Incumbent LECs' suggestion that adoption of special access performance measurements and standards would be inconsistent with the Commission's grant to certain incumbent LECs of greater flexibility in pricing special access services is simply wrong.²⁷

In affording incumbent LECs greater special access pricing flexibility, the Commission did not find that incumbents lacked market power in the provision of special access service, and, indeed, specifically declined to grant incumbent LECs in this market segment all the regulatory relief afforded non-dominant carriers.²⁸ The very reasons that prompted the Commission's refusal to lift tariffing requirements from incumbent LEC provision of special access services, compel adoption here of special access performance measurements and standards. And this underlying rationale is all the more compelling because with pricing flexibility came not only a deterioration of service quality, but as the Ad Hoc Telecommunications Users Committee ("Ad Hoc") demonstrates, higher prices.²⁹ Indeed, Ad Hoc reports that its "review of generally available pricing data for special access services in MSAs where Phase II pricing flexibility has been granted reveals that ILECs are charging higher prices in those MSAs – where competition is presumably greatest – than in the non-Phase II areas in the same states and density zones, where competition supposedly has not developed."³⁰

²⁷ BellSouth Comments at 13 - 14; Qwest Comments at 7 - 8; Verizon Comments at 5 - 9.

²⁸ Access Charge Reform, 14 FCC Rcd. 14221, ¶ 151 (1999) (*subsequent history omitted*).

²⁹ Comments of the Ad Hoc Telecommunications Users Committee at 4 - 6.

³⁰ Id. at 4 - 5. By way of humorous contrast, Verizon declares that "the same competitive pressures that assure that ILECs will reasonably price special access services assure that ILECs will reasonably provision special access services," and SBC opines that "[t]he same market forces that constrain anticompetitive pricing assure that carriers will provide the service options (including quality of service and service guarantees) that customers demand." Verizon Comments at 7; SBC Comments at 10.

2. The Commission has Ample Authority to Adopt,
Implement and Enforce Special Access Performance
Measurements and Standards

The Large Incumbent LECs do not seriously dispute the Commission’s authority to adopt and implement special access performance measurements and standards. Indeed, BellSouth acknowledges that “[u]nder its rulemaking authority, the Commission has the authority to adopt rules that would require LECs to incorporate special access performance measures into their interstate access tariff[s].”³¹ And Verizon and Qwest concede that the Commission is authorized under Sections 201(b) and 202(a)³² to adopt generally applicable performance measurements and

³¹ BellSouth Comments at 21.

³² 47 U.S.C. §§ 201(b), 202(a).

standards.³³ The Large Incumbent LECs do, however, challenge the Commission's authority to adopt self-executing fines and penalties.³⁴

As ASCENT indicated in its Comments, self-executing liquidated damage provisions may be prescribed by the Commission pursuant to Section 205,³⁵ and, BellSouth's arguments to the contrary notwithstanding,³⁶ the Commission could effect such a prescription in this rulemaking proceeding. The Commission could prescribe here, and direct incumbent LECs to incorporate into their interstate tariffs, not only special access performance measurements and standards, but provisions identifying the liquidated damages that a carrier would be required to pay for failing to meet those thresholds.³⁷

³³ Qwest Comments at 9 - 10; Verizon Comments at 12 - 19. BellSouth's claim that "specific metrics associated with special access performance measures" may only be adopted pursuant to Section 205 is incorrect. BellSouth Comments at 21 - 22. As ASCENT demonstrated in its Comments, the Commission has broad authority under Sections 201(b) and 202(a), in conjunction with Section 4(i), to regulate incumbent LEC provision of special access services, including the specification of threshold levels of service quality which define the outer range of just and reasonable practices.

³⁴ BellSouth Comments at 24 - 26; Qwest Comments at 11 - 16; Verizon Comments at 21 - 24.

³⁵ 47 U.S.C. § 205

³⁶ BellSouth Comments at 21 - 22.

³⁷ The Large Incumbent LECs confirm that such matters are readily tariffable. Thus, for example, SBC declares that its "standard special access tariffs contain performance measurements and penalties for missing certain targets, including targets relating to service installation on-time performance and service interruption." SBC Comments at 11. That current tariff mechanisms are an inadequate substitute for Commission prescribed performance measurements and standards, however, is confirmed by the deteriorating level of incumbent LEC special access services.

The Commission has previously recognized its authority to engage in prescriptions within the rulemaking context. For example, in the rulemaking proceeding in which it directed Tier 1 LECs to offer expanded interconnection opportunities to competitors and large volume users, the Commission prescribed the associated rate structure and pricing measures, noting that it had “ample legal authority” to do so “pursuant to Sections 1, 4(i), 201, 202, 205, and 214(d) of the Communications Act.”³⁸ As the Commission explained, having concluded, “in light of . . . [its] finding that the provision of expanded interconnection by Tier 1 LECs would produce substantial public interest benefits,” that “continuation of the current special access rate structure by the Tier 1 LECs would be unjust and unreasonable in violation of Section 201(b) of the Act,” Section 205 “permit[ted] . . . [it], after full hearing, ‘to determine and prescribe’ the ‘just, fair and reasonable’ rate, classification or practice to be followed in the future.”³⁹ And the Commission added, citing *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 238 - 46 (1973), “[a] notice and comment rulemaking proceeding fulfills this requirement.”⁴⁰ Here, the Commission can readily find that deteriorating incumbent LEC special access provisioning “represents a barrier to the further development of . . . competition,”⁴¹ constituting an unjust, unreasonable and discriminatory practice, and prescribe performance measurements and standards, as well as liquidated damages provisions to ensure just, fair and reasonable practices in the future.

ASCENT, however, does not disagree with the Large Incumbent LECs that monetary

³⁸ Expanded Interconnection with Local Telephone Company Facilities (Report and Order), 7 FCC Rcd. 7369, ¶ 219 (1992) (*subsequent history omitted*); see also Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport (Second Report and Order), 12 FCC Rcd. 18,730, ¶ 55 (1997) (*subsequent history omitted*).

³⁹ Id. at ¶¶ 223 - 24

⁴⁰ Id. at ¶ 224, fn. 524.

⁴¹ Id. at ¶ 223.

forfeitures may not be levied without affording the targeted carrier an opportunity for a hearing. The triggers for, as well as the level of, such forfeitures, however, can be established in advance. Notices of Apparent Liability for Forfeiture should be issued automatically in predetermined amounts if triggers are breached. Certainly, incumbent LECs must be afforded the opportunity to contest both the violations with which they are charged and the penalties proposed to be assessed for such violations. But resolution of any such challenges must be swift in order to achieve the sought after deterrent effect. While certainty (of both violative conduct and resultant penalties) and speed are essential elements of an effective enforcement scheme, due process rights can be accommodated without undermining the deterrent effect of enforcement so long as the enforcement mechanism is efficiently administered.

3. Conclusion

By reason of, and consistent with, the foregoing, the Association of Communications Enterprises again urges the Commission to adopt national performance measurements and standards for incumbent LEC provision of special access services.

Respectfully submitted,

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